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1990]

**UNITED STATES V. GENERAL MOTORS CORPORATION:
STRIKING A BALANCE UNDER THE CLEAN AIR ACT
BETWEEN EPA POWER TO PENALIZE AND THE RIGHT
OF STATES TO TAILOR REVISIONS OF THEIR STATE
IMPLEMENTATION PLANS**

I. INTRODUCTION

In 1980 the Environmental Protection Agency (EPA) approved a Massachusetts State Implementation Plan (SIP) pursuant to the Clean Air Act (CAA)¹ which governed the release of volatile organic compounds (VOCs) from automotive painting operations in the state.² The only plant affected by the SIP was owned and operated by the General Motors Corporation (GMC).³ This original SIP required full compliance with emission guidelines by the end of 1985.⁴ However, in light of technological advances made in automotive painting operations, the EPA in 1981 issued a statement that provided states the opportunity to submit SIP revisions that could defer for one or two years the emission requirements for those who wished to take advantage of the new technology.⁵ In November of 1984, GMC submitted to the state

1. Clean Air Act §§ 101-403, 42 U.S.C. §§ 7401-7642 (1982 & Supp. V 1987)(hereinafter CAA).

2. United States v. General Motors Corp., 876 F.2d 1060, 1063 (1st Cir. 1989), *aff'd*, 110 S. Ct. 2529 (1990). The EPA's approval can be found at 45 Fed. Reg. 61293, 61295 (1980).

VOCs react with the atmosphere to produce ozone. *General Motors Corp.*, 876 F.2d at 1063. In *American Petroleum Institute v. Costle*, 665 F.2d 1176, (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982), the court described the effects that ozone may have:

At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness, and headaches. Due to its irritating nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. Ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading and weathering.

Id. at 1181.

3. *General Motors Corp.*, 876 F.2d at 1063. GMC had an automotive assembly plant in Framingham, Massachusetts. *Id.*

4. *Id.* For a discussion of the CAA statutory framework, see *infra* notes 22-38 and accompanying text.

5. *Id.* at 1063. In 1981, GMC was using lacquer-based paints in its plant in Framingham. *Id.* That year the EPA issued its policy statement that lower-emitting base-coat/clearcoat enamel systems had become technologically feasible. 46 Fed. Reg. 51366 (1981).

a proposed revision seeking to defer the compliance date of the original SIP without, however, switching to the new technology.⁶ Then, in June of 1985, GMC altered its plan and made a new proposal to the state to convert its existing plant to the new technology by the summer of 1987 which the state approved and submitted to the EPA on December 30, 1985.⁷

GMC continued to operate its existing plant and at the same time began construction of a new plant that would employ the new technology.⁸ Subsequent to failed multilateral negotiations among the regional branch of the EPA, the state and GMC, the EPA issued a Notice of Violation to GMC on August 14, 1986 for GMC's failure to comply with the original SIP.⁹ On December 2, 1986 the EPA issued a proposed disapproval of the SIP revision and on September 4, 1988 the EPA issued its decision rejecting the proposal.¹⁰

Before issuing its formal rejection of the proposed revision, the EPA commenced an enforcement action against GMC under section 113 of the CAA for failing to meet the 1985 deadline set by the original SIP.¹¹ The district court granted GMC's motion for summary judgement reasoning that the EPA's failure to review the SIP revision within four months, as the court believed was required by the CAA, precluded the enforcement of the original SIP after the four month period and prior to the disapproval of the proposed revision.¹² On appeal by the United States, in

6. *Id.* at 1063-64. The revised SIP that GMC submitted to the state requested the deferral in order to employ emission control devices to its existing lacquer-based operations. *Id.* at 1064. GMC did, however, take advantage of an innovative technology waiver for three other automotive painting operations outside of Massachusetts. 47 Fed. Reg. 34342, 34343 (1982).

7. *Id.* at 1063-64. The second plan submitted by GMC became an "eleventh hour" revision as it was not submitted to the EPA by the state until one day before compliance was required under the existing SIP. *Id.*

8. *Id.* Construction of the new plant was prior to the EPA's disapproval of the SIP revision. *Id.*

9. *Id.* For a discussion of government enforcement procedures, see *infra* notes 34-38 and accompanying text.

10. *Id.* at 1064.

11. *Id.* The EPA brought the action in the United States District Court for the District of Massachusetts on August 17, 1987.

12. *United States v. General Motors Corp.*, 18 Env't Rep. (BNA) 20853 (Mass. D.C. 1988). The district court followed the reasoning of its fellow district court in *United States v. Alcan Foil Products*, 694 F. Supp. 1280 (W.D. Ky. 1988). The district court in *General Motors Corp.* found that the intent of the CAA would be violated if the federal government had the power to enforce existing SIPs while at the same time it proceeded indefinitely without ruling on a state's proposed revision. *General Motors Corp.*, 18 Env't Rep. (BNA) 20853, 20854.

United States v. General Motors Corp.,¹³ the First Circuit reversed the grant of summary judgement and held that while the four month review period for original SIPs applied to revisions,¹⁴ the EPA's failure to take timely action on a proposed revision could result in a reduction of penalties assessed against GMC for violation of the original SIP to the extent that the EPA delay was unwarranted.¹⁵ The First Circuit's holding embraced the majority view that the CAA imposes a four month period for EPA review of SIP revisions,¹⁶ but the court's additional holding further split the circuit courts on the issue of the consequences that result from the EPA's failure to review SIP revisions within the four month period.¹⁷ Recently, on writ of certiorari, the Supreme Court in *General Motors Corp. v. United States*,¹⁸ held that the CAA does not require the EPA Administrator to review SIP revisions within four months,¹⁹ and that the Administrative Procedure Act (APA)²⁰ does not bar enforcement of SIPs when the EPA unreasonably delays action on proposed revisions.²¹ This Note will examine the approaches of the First Circuit and Supreme Court to the resolution of the issues involved in the EPA's timely review of SIP revisions.

13. 876 F.2d 1060 (1st Cir. 1989), *aff'd*, 110 U.S. 2528 (1990).

14. *Id.* at 1066.

15. *Id.* at 1068. The First Circuit remanded the case back to the district court for a determination of the reasons for the EPA's failure to make timely review of the SIP revision and to adjust the penalties accordingly. *Id.* at 1068-69.

16. The majority view is that the four month period for EPA review of original SIPs also applies to revisions. *United States v. Alcan Foil Products*, 889 F.2d 1513, 1518 (6th Cir. 1989); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *Council of Commuter Org. v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *Duquesne Light v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Org. v. Gorsuch*, 683 F.2d 648, 651 n.2 (2d Cir. 1982). Only the Sixth Circuit, before *Alcan Foil Products*, had refused to apply the four month period to SIP revisions. *United States v. National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985).

17. Prior to the First Circuit's decision in *General Motors Corp.*, two circuits had addressed this issue. In *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987), the Fifth Circuit held that EPA failure to make timely review of the revision would bar the Agency from collecting penalties until a ruling was made on the revision. *Id.* at 498-501. In contradistinction, the D.C. Circuit in *Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983), held that the EPA's failure to make timely review of a SIP revision did not bar penalties, but the penalties should be held in abeyance pending the decision of the proposed revision. *Id.* at 471-72.

18. 110 S. Ct. 2528 (1990).

19. *Id.* at 2531-33.

20. Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1982 & Supp. V 1987)(hereinafter referred to as APA).

21. *General Motors Corp.*, 110 S.Ct. at 2533-34.

II. LEGAL BACKGROUND

A. The Clean Air Act

The CAA states that one of its purposes is "to protect and enhance the quality of the Nation's air resources."²² In an effort to achieve this and other goals, Congress structured the CAA in a manner that split the rights and responsibilities between the federal government and state and local governments.²³ Thus, Congress created a symbiotic relationship which generally mirrors the federal system of government.²⁴

Under the CAA, the EPA, the federal agency in charge of administering the CAA, is required to determine and publish a list of hazardous pollutants.²⁵ The EPA must also promulgate National Ambient Air Quality Standards (NAAQS) which specify ac-

22. CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1).

23. Congress clearly intended for the states to play an integral role in combating air pollution. The CAA states, "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . ." *Id.* § 101(a)(3), 42 U.S.C. § 7401(a)(3). However, Congress also gave the federal government a large role under the CAA. In the Act's declaration of purpose it states that "Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." *Id.* § 101(a)(4), 42 U.S.C. § 7401(a)(4).

24. *See Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981) (where court draws parallel between division of power among states and federal government in CAA and federal system of government generally).

The history of the CAA and its amendments has become part of the increasing role played by the federal government in combating air pollution. The CAA was originally enacted in 1963, Pub. L. No. 88-206, 77 Stat. 392. The original CAA granted the federal government a comparatively modest role by granting it the authority to increase research efforts, to make grants to state air pollution control agencies, and to play a role, under certain circumstances, in interstate pollution. The next major amendments came in the form of the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485. These Amendments increased the role of the federal government by granting it limited powers of supervision and enforcement. The Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, further increased the role of the federal government by requiring states to comply with air quality standards within a prescribed timetable. One salient aspect of the 1970 Amendments was to give the EPA the power to order enforcement of applicable SIPs. CAA § 113, 42 U.S.C. § 7413.

In 1977 Congress further amended the CAA, Pub. L. No. 95-609, 91 Stat. 712 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982 & Supp. V 1987)). These latest Amendments introduced an additional requirement for SIPs applicable to "non-attainment areas," those areas which had fallen short of National Ambient Air Quality Standards (NAAQS). *Id.* § 171(2), 42 U.S.C. § 7502(2). The 1977 Amendments set a deadline of December 31, 1982 for primary NAAQS, and granted further extensions in some cases until December 31, 1987 but required compliance with the NAAQS as soon as possible. *Id.* § 172(a), 42 U.S.C. § 7502(a).

25. CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1).

ceptable levels of the hazardous pollutants identified and published under the CAA.²⁶

Section 110 of the CAA outlines the requirements and deadlines for SIPs, providing the states with a framework in which to achieve and maintain the NAAQS.²⁷ The EPA then has four months to review the proposed SIPs and to approve, disapprove, or approve in part the submitted plans.²⁸ The CAA provides specific guidelines for EPA review of submitted plans which restrict EPA review to the substantive requirements of section 110 of the CAA.²⁹ Thus, the CAA, by limiting the EPA's review process and by imposing deadlines on the states, places restrictions on both the federal and state governments creating a partnership in battling air pollution.

Not necessarily permanent upon approval, SIPs may be revised under section 110(a)(3).³⁰ Revisions allow states to amend their prior implementation plans in response to changed conditions, improved technology, or reassessed needs.³¹ Section 110(a)(3)(A) states that a revision to an implementation plan must be reviewed by the EPA in light of the requirements applicable to an original plan set forth in section 110(a)(2).³² However, section

26. *Id.* § 109, 42 U.S.C. § 7409. The NAAQS are standards that the EPA is required to publish for certain types of air pollution. *Id.* Since these standards are uniform for all states, the NAAQS prevent manufacturers from "shopping" among the states for the least restrictive environmental standards. *Id.* The NAAQS were part of the 1970 Amendments to the CAA which required the EPA Administrator to promulgate the standards within thirty days of the passage of the Amendments. *Id.* § 109(a)(1), 42 U.S.C. § 7409(a)(1).

27. *Id.* § 110, 42 U.S.C. § 7410. This section requires each state to submit a SIP within nine months after the promulgation of the NAAQS. *Id.* § 110(a)(1), 42 U.S.C. § 7410(a)(1).

The 1977 Amendments to the CAA added an additional requirement for a "nonattainment area," an area where the air quality falls short of the NAAQS. *Id.* § 171(2), 42 U.S.C. § 7501(2).

28. *Id.* 110(a)(2), 42 U.S.C. § 7410(a)(2). The CAA requires that: [t]he Administrator shall, within four months after the date required for submission of a plan under paragraph (1) [section 110(a)(1)], approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that . . . "

Id.

The statute goes on to list the substantive requirements needed for approval. *Id.* § 110(a)(2)(A)-(K), 42 U.S.C. § 7410(a)(2)(A)-(K). With EPA approval of the states' SIPs, the start-up stage of the CAA was completed.

29. *Id.* § 110(a)(2)(A)-(K), 42 U.S.C. § 7410(a)(2)(A)-(K).

30. *Id.* § 110(a)(3), 42 U.S.C. § 7410(a)(3). For the text of § 110(a)(3)(A), see *infra* note 32.

31. The CAA does not require states to make any showing in order to revise its SIPs.

32. *Id.* § 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A). The Act states that "[t]he

110(a)(3)(A) is silent as to the deadline for EPA review.³³

Should a party fail to comply with emission requirements of an "applicable implementation plan,"³⁴ the CAA provides two avenues for government enforcement. First, section 113 authorizes the EPA to institute federal enforcement actions.³⁵ Under this section, the EPA is empowered to issue orders requiring compliance with applicable SIPs, to commence civil suits for injunctions, and to assess criminal penalties for knowing violations.³⁶ Second, section 120 authorizes the EPA to issue an administrative order for assessment and collection of a noncompliance penalty.³⁷ Section 120 is designed to add an additional incentive for noncomplying sources to meet emission standards by measuring the penalties to be imposed by the value of noncompliance.³⁸ In addition to government enforcement, the CAA also provides that any person may bring a citizen's suit against a person in violation of an emission standard, order of the Administrator, or against the Administrator to compel agency action.³⁹

In addition to the CAA, the APA also places requirements on the Administrator of the EPA. Specifically, the EPA is under a

Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings." *Id.*

33. See *supra* note 32 for the text of section 110(a)(3)(A) of the CAA.

34. The CAA defines an "applicable implementation plan" as: "the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section [section 110] or promulgated under subsection (c) of this section and which implements the requirements of this section." *Id.* § 110(d), 42 U.S.C. § 7410(d).

The existing SIP is the "applicable implementation plan" until a revision has been approved. See *Train v. NRDC*, 421 U.S. 60, 92 (1975).

35. CAA § 113, 42 U.S.C. § 7413. This section of the CAA permits the Administrator to bring an action in federal district court against the noncomplying person.

36. *Id.* Under section 113, the EPA must first notify the noncomplying person. If after thirty days after notification the person is still in violation of the applicable standards, the EPA may issue an order to comply with the applicable standards or may bring a civil suit against the noncomplying person. *Id.* § 113(a)(1), 42 U.S.C. § 7413(a)(1).

37. *Id.* § 120, 42 U.S.C. § 7420.

38. *Id.* Section 120, part of the 1977 amendments to the CAA, expanded the enforcement scheme to include noncompliance penalties. Section 120 is an administrative process whereby the EPA assesses and collects the penalty for noncompliance subject to judicial review under subsection (e) of section 120. Thus, this section differs from section 113 not only in the nature of the penalty assessed, but also in the degree to which the EPA is the *assessor*.

39. *Id.* § 304, 42 U.S.C. § 7604. This section provides that civil suits may be commenced against the Administrator for his or her failure to perform a non-discretionary act or duty. *Id.*

general duty to conclude matters before it in a "reasonable time."⁴⁰ Should the EPA "unreasonably" delay an act it is obligated to perform, the APA provides that a court shall compel the agency to act.⁴¹

B. Deadline for EPA Review of SIP Revisions

In interpreting the CAA, an emerging majority of the circuit courts has held that the Act imposes a four month period for EPA review of SIP revisions. The Second Circuit was the first circuit court to address this issue in *Council of Commuter Organizations v. Gorsuch*.⁴² In *Gorsuch*, the state of New York was required to submit a revised implementation plan by July 1, 1982.⁴³ The court, while acknowledging an ambiguity in the CAA, reasoned by analogy to section 110(a)(2), which limits the EPA to a four month decision-making period, and found that the EPA was required to rule on SIP revisions within four months as well.⁴⁴

With little substantive analysis, the District of Columbia Circuit in *Duquesne Light Co. v. Environmental Protection Agency*⁴⁵ also held that the EPA was required to review submitted revisions within four months.⁴⁶ Additionally, the Fifth Circuit, in *American*

40. Administrative Procedure Act, 5 U.S.C. § 555(b).

41. *Id.* § 706(1). This provision is similar to section 304 of the CAA. The distinction between these two provisions is that suits brought under section 304 of the CAA are proper when the EPA is acting under statutory deadlines, whereas section 706(1) suits may be brought when the EPA is acting under a general duty to act within a reasonable time. See *Sierra Club v. Thomas*, 828 F.2d 783, 791-92 (D.C. Cir. 1987).

42. 683 F.2d 648 (2d Cir. 1982).

43. *Id.* at 650-51. Congress had required New York to revise its implementation plan to include a provision for an improvement of its mass transit program. *Id.* This revision was required by August 1, 1978. *Id.* New York submitted its revised SIP by the congressionally mandated deadline. *Id.* The EPA approved the revised plan three years later on September 9, 1981. *Id.* The EPA approval was, however, conditioned on the state's promise to submit subsequent revisions by July 1, 1982. *Id.* at 650.

44. *Id.* at 651-52 n.2. The court resolved this issue in a footnote. As a result, there is little indication of the court's reasoning.

The Second Circuit later reaffirmed this finding in *Council of Commuter Org. v. Thomas*, 799 F.2d 879 (2d Cir. 1986). Again, the court offered little analysis of its construction of the CAA on this issue. *Id.* at 888.

45. 698 F.2d 456 (D.C. Cir. 1983). The court noted that section 110(a)(3)(B) of the CAA requires EPA review of a SIP revision within three months if it was in relation to fuel burning stationary sources. *Id.* Section 110(a)(3)(B), unlike section 110(a)(3)(A), does explicitly impose a deadline for EPA review.

46. *Id.* at 471.

Cyanamid Co. v. Environmental Protection Agency,⁴⁷ following the decisions of the First and District of Columbia Circuits also held that the four month limit applied to SIP revisions.⁴⁸ The court in *American Cyanamid* stated that applying the four month review period to revisions supported the relationship in the CAA between the federal and state governments.⁴⁹

Only the Sixth Circuit in *United States v. National Steel Corp.*⁵⁰ has held the view that the four month deadline did not apply to revisions. The court in *National Steel* found, also with little analysis, that the four month review requirement for original SIPs of section 110(a)(2) applied only to "general state plans submitted under section 110(a)(1), not for revisions to state plans governed by section 110(a)(3)(A)."⁵¹ Thus, the court seemed to reject the theory that the four month rule applied to revisions either explicitly or by analogy.

The Sixth Circuit later reversed its position in *United States v. Alcan Foil Products*⁵² and held that the four month review period for original SIPs also applied to SIP revisions.⁵³ In *Alcan Foil Products* the Sixth Circuit suggested that its prior comments in *National Steel* were dicta⁵⁴ and that the case had been decided on due process grounds.⁵⁵ In joining the view of the majority of the circuits, the Sixth Circuit looked to section 110(g) of the CAA, a section added in the 1977 Amendments which granted governors special authority when SIP revisions are not acted upon within the "required four months period,"⁵⁶ as a persuasive sign of a prior Con-

47. 810 F.2d 493 (5th Cir. 1987). This court also provided little analysis in concluding that the four month review period applies to SIP revisions.

48. *Id.* at 495.

49. *Id.* at 495. The court stated that, "the statute [Clean Air Act] . . . recognized in the time limit the important role of the states." *Id.*

50. 767 F.2d 1176 (6th Cir. 1986).

51. *Id.* at 1182 n.1.

52. 889 F.2d 1513 (6th Cir. 1989).

53. *Id.* at 1515-18.

54. *Id.* at 1517. The Sixth Circuit agreed with the *General Motors* court that the footnote regarding SIP revisions was "arguably dicta." *Id.* (quoting *General Motors Corp.*, 876 F.2d at 1066).

55. *Alcan Foil Products*, 889 F.2d at 1517. Referring to *National Steel*, the court stated "[w]e concluded that all the circumstances, most importantly the consent decree's provision prohibiting the use of a proposed SIP revision to postpone compliance dates, negated a finding of a due process violation." *Id.*

56. Section 110(g) states:

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan *revision* which the State determines —

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in

gress' intent to require review of revisions within four months.⁵⁷

C. The Consequences of EPA Failure to Timely Review Revisions

Accepting what became the majority view that the EPA must act on SIP revisions within four months, the ramifications from the failure of the EPA to meet this deadline had to be determined. The *Duquesne Light* court was the first circuit court case to address this issue.⁵⁸ The court held that after the four month review period had passed, noncompliance penalties must be held in abeyance until the EPA rules on the revised SIP; moreover, if the EPA did not ultimately approve the revision, the penalty is effective retroactively with interest.⁵⁹ In *Duquesne Light* the District of Columbia Circuit rejected two arguments put forth by the EPA. First, the EPA argued that, regardless of how long it took to act on a proposed revision, it had the authority to assess noncompliance penalties pursuant to section 120 against sources in violation of a present SIP, even though the source would be in compliance with the SIP revision if accepted.⁶⁰ The District of Columbia Circuit stated that "[s]uch an inequitable use of the penalty powers is neither called for nor authorized."⁶¹ Second, the court rejected the EPA's argument that section 304(a), under which a source could petition to compel agency action, acts as a sufficient safeguard against dilatory conduct by the EPA.⁶² The court, however,

unemployment which would result from such closing, and which the Administrator has not approved or disapproved under this section *within the required four month period*, the governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source.

42 U.S.C. § 7410(g) (emphasis added).

57. *Alcan Foil Products*, 889 F.2d at 1518. The court noted that since section 110(g) was added by the ninety-fifth Congress it was not controlling on the issue of the intent of the ninety-first Congress, but it also noted that the latter's interpretation did have substantial weight. *Id.*

58. *Duquesne Light*, 698 F.2d 456 (D.C. Cir. 1983).

59. *Id.* at 472.

60. *Id.* at 471. The court rejected the EPA's argument, in part, because of the EPA's failure to take timely action on the SIP revision and on other deadlines required in the CAA. *Id.* at 471-72.

61. *Id.* at 472. The court asserted that allowing the EPA to collect such penalties violated congressional intent as it might allow the EPA to collect penalties when its prompt action on a revision would result in no penalties. *Id.*

62. *Id.* Section 304(a) of the CAA states, in part:

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instru-

also rejected an argument put forth by the petitioners who sought to have the penalties tolled at the time the deadline for acting on revisions had passed.⁶³ The court stated that its holding would strike an appropriate balance: it would protect a source in compliance with a revision eventually approved, but it would not allow a source in noncompliance to economically benefit if the revision was rejected.⁶⁴

The Fifth Circuit took quite a different approach to this issue in *American Cyanamid Co. v. EPA*.⁶⁵ In *American Cyanamid* the court held that failure to meet the statutory deadline would result in a bar on penalties "between (1) four months after a state submits a proposed revision and (2) the date the EPA rejects that revision."⁶⁶ The court noted two significant and hazardous effects resulting from the holding in *Duquesne Light*. First, the rule developed by the District of Columbia Circuit in *Duquesne Light* provided no incentive for the EPA to act within the four month period.⁶⁷ Second, the *Duquesne Light* rule, according to the court, increased the danger that the EPA might reject pending revisions which it ought not to reject.⁶⁸ The court concluded that a bar on penalties for the specified time, on the other hand, would create an incentive for the EPA to act promptly and would not create an inclination on the part of the EPA to reject revisions.⁶⁹ The *Amer-*

mentality or agency to the extent permitted by the eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . .

42 U.S.C. § 7604(a).

63. *Duquesne Light*, 698 F.2d at 472. The court reasoned that to toll the penalties after four months, when a revision would be later rejected, would permit the noncomplying source to benefit. *Id.*

64. *Id.* The court ordered the EPA to promulgate a new regulation that would require that the noncompliance penalty be held in abeyance pending the EPA's final action on the revision. *Id.*

65. 810 F.2d 493 (5th Cir. 1987). Like the *Duquesne Light* case, this case began by the EPA assessing a section 120 noncompliance penalty.

66. *Id.* at 500.

67. *Id.* at 499. The court reasoned that the *Duquesne Light* resolution of this issue gave the EPA no incentive, as it calculated penalties back to the review deadline with interest. *Id.*

68. *Id.* The Sixth Circuit looked at the facts before it in light of the *Duquesne Light* rule and concluded that the EPA might be hesitant in approving the revision submitted by the state and admitting that the penalties were inappropriate. The court stated that "[t]hese incentives may distort the EPA's even-handed administration of the Act." *Id.*

69. *American Cyanamid*, 810 F.2d at 499.

ican Cyanamid court found the statutory relationship set up in the CAA between the states and the federal government to be an important element in the analysis of this issue.⁷⁰ The court found that the EPA's failure to act promptly on SIP revisions violated the cooperative spirit that Congress had intended for the states and the federal government.⁷¹

In *Alcan Foil Products*, a case decided after *General Motors Corp.*, the Sixth Circuit held that the EPA must act upon SIP revisions within four months and that, should the EPA fail to do so, penalties could be assessed from the date of noncompliance; however, the government must justify the EPA's delay if it was shown that the plant owner was in compliance with a proposed revision.⁷² The court stated that the most effective remedy for a party claiming compliance with a proposed revision is found in section 113(b), which provides the district courts with discretionary power in assessing penalties.⁷³ The Sixth Circuit further held that if the plant owner established that it was in compliance with a revision, the district court must balance the reasonableness of the EPA delay with whatever prejudice the source can establish.⁷⁴

IV. ANALYSIS OF THE FIRST CIRCUIT'S DECISION

A. Deadline for EPA Review of SIP Revisions

In *United States v. General Motors Corp.* the First Circuit's decision was in accord with the majority view in the circuit courts.⁷⁵ GMC⁷⁶ argued that the structure and legislative history of the CAA supported its view that section 110(a)(3)(A) incorporated

70. *Id.* at 499-500.

71. *Id.* The court believed that this element of the analysis had been lacking in earlier treatments. *Id.* at 499. In fact, the court saw EPA cooperation as *the* issue in the case. The court stated, "[t]he issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the states in implementing standards and enforcing the Clean Air Act." *Id.* at 500.

72. *Alcan Foil Products*, 899 F.2d at 1517-21. The Sixth Circuit reasoned that an enforcement bar would be too drastic and that courts should not assume that Congress intended an agency to lose its enforcement powers merely because of its failure to meet a deadline. *Id.* at 1520 (citing *Brock v. Pierce County*, 476 U.S. 253 (1986)).

73. *Id.* at 1521. The court expressed reservation about the effectiveness of section 304(a) actions to compel the agency to rule on SIP revisions. *Id.*

74. *Id.*

75. See *supra* notes 42-57 and accompanying text.

76. The Commonwealth of Massachusetts filed an amicus curiae brief. The state's brief reiterated some of the arguments made by GMC in its brief. *General Motors Corporation*, 876 F.2d at 1065.

the procedural requirements of section 110(a)(2), namely a four month review period.⁷⁷ Specifically, GMC stressed that the structure of the CAA shows a congressional intention to give the states an integral role in determining how best to achieve air quality goals,⁷⁸ as is evidenced by the substantive limits placed on the EPA in reviewing SIPs⁷⁹ and by the power of the states to submit revisions to existing SIPs.⁸⁰ GMC further argued that failure to read the four month period into the CAA would, contrary to congressional intent, give the EPA too much power, as it would essentially give the EPA "pocket veto" over SIP revisions and thereby hinder companies in making long range plans.⁸¹

The EPA, on the other hand, argued that the continued participation of the states, while clearly envisioned by Congress, did not depend on the imposition of a four month review period for revisions.⁸² Moreover, the EPA argued that had Congress intended a four month review period for revisions, it would have explicitly required the deadline in section 110(a)(3)(A) as it had done under other sections of the CAA.⁸³ Lastly, the EPA argued that the language of section 110(a)(3)(A) supported the view that that section incorporated only the substantive requirements of section 110(a)(2) because the word "it" in the later section re-

77. *Id.*

78. In its appellate brief, GMC noted Congress' emphasis on the states' role under the CAA:

Thus, for example, in considering amendments to the statute in 1977, the responsible House committee reiterated that one of the Act's principal purposes was "to give the States more flexibility in determining how to protect public health while still permitting reasonable new growth." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 213 (1977). The Senate similarly emphasized the need for State authority and flexibility: "The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals."

Brief for Appellee at 20 n.23, *United States v. General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989) (citation omitted).

79. *Id.* at 1065. The substantive limitations placed on EPA review of SIPs are stated in section 110(a)(2)(A)-(K). For a discussion of section 110(a)(2), see *supra* notes 28 & 29 and accompanying text.

80. *Id.*

81. *Id.*

82. *General Motors Corp.*, 876 F.2d at 1066.

83. *Id.* The EPA argued that the four month review period for original SIPs was necessary to put the regulatory framework in as soon as possible. *Id.* Additionally, the EPA believed that the four month review period for the original SIPs was possible because the Agency had already done a substantial amount of work on the matter. *Id.*

ferred to the revision and not the Administrator.⁸⁴

The First Circuit held for GMC on this issue, finding that the states' interest in determining policy choices would be overly compromised by not requiring the EPA to act within four months.⁸⁵ The court stated that it agreed with the reasoning of GMC that Congress did not intend to limit the power of the states to tailor SIP revisions by giving the EPA the power to review revisions according to its own discretionary schedule.⁸⁶

It is submitted that the First Circuit, and the other circuit courts that have ruled on this issue, have not considered this matter of statutory construction in great depth.⁸⁷ The First Circuit, as well as the other circuits which have held similarly, placed little emphasis on the fact that Congress, where it believed it was appropriate, had explicitly included a number of deadlines in the CAA.⁸⁸ It is a rule of statutory construction that where Congress includes a requirement under one section of a statute, but not another, that that omission was intentional.⁸⁹ Furthermore, while the language of section 110(g) of the CAA does lend support to the view that Congress intended to impose a four month review

84. *Id.* For the text of section 110(a)(3)(A), see *supra* note 32.

85. *Id.* The court stated, "[t]he states' freedom to make such choices obviously is curtailed to the extent that SIPs must be consistent with federal standards. It seems unlikely, however, that Congress also intended for the states' legitimate policy choices to be held hostage to the EPA's schedule." *Id.*

86. *Id.* As GMC noted in its brief, "[t]he principle of deterrence upon which the EPA seeks to rely here is meant to recognize agency expertise — not to reward agency stubbornness." Brief for Appellee at 24, *General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989).

87. In reading the four month review period into section 110(a)(3), the courts have generally looked primarily to the structure of the CAA and the relationship between the federal and state governments as a sign of congressional intent to include this limitation in section 110(a)(3). See *United States v. Alcan Foil Products*, 899 F.2d 1513, 1518 (6th Cir. 1989); *United States v. General Motors Corp.*, 876 F.2d 1060, 1066 (1st Cir. 1989); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *Council of Commuter Org. v. Gorsuch*, 683 F.2d 648, 651 n.2 (2d Cir. 1982). In gleaning Congressional intent from the structure and purpose of the CAA, the courts generally have not expressed their views on other issues of statutory construction.

88. See, e.g. CAA § 110(a)(3)(B), 42 U.S.C. § 110(a)(3)(B) (imposes three month review period on certain SIP revisions involving fuel burning stationary sources). The court considered this argument; however, it believed that this was not a proper issue on which to defer to the EPA, as it had an institutional interest in the matter. *General Motors Corp.*, 876 F.2d at 1066. Nevertheless, while this may not have been a proper issue to defer to the EPA's interpretation, that did not preclude the court from considering this rule of statutory construction. *Id.*

89. See *Sierra Club v. Thomas*, 828 F.2d 783, 797 n.99 (D.C. Cir. 1987) (court stated "[b]ecause the Act imposed deadlines in some areas, we must conclude that Congress' failure to impose deadlines elsewhere was not inadvertent").

period on SIP revisions, that section was an act of a later Congress and, as such, it did not necessarily show the intent of the prior Congress which had passed section 110(a)(3)(A).⁹⁰

B. The Consequences of EPA Failure to Make a Timely Review of Revisions

In its analysis of the ramifications of the EPA's failure to act on a SIP revision within four months, the First Circuit in *General Motors Corp.* rejected the analysis of both the Fifth Circuit and the D.C. Circuit as too "extreme."⁹¹ The *General Motors Corp.* court rejected the Fifth Circuit's holding in *American Cyanamid* that barred collection of penalties until a final ruling, because it failed to consider the practical reality that the EPA will frequently need longer than four months to adequately review a proposed revision.⁹² Moreover, in dicta the court pointed out that while section 110(g) recognized the four month deadline for EPA review of revisions, section 110(g) did not bar the EPA from collecting penalties for violations of the existing SIP.⁹³ The *General Motors Corp.* court also rejected the District of Columbia Circuit's holding, requiring that penalties be held in abeyance until a final resolution, contending that it failed to provide the EPA with an incentive to act promptly.⁹⁴

In an effort to address what the court saw as the inadequacies of the approaches to this issue by the Fifth and District of Columbia Circuits, the First Circuit in *General Motors Corp.* attempted to "steer a middle course between these two extremes."⁹⁵ The

90. For the text of section 110(g) and a brief discussion of its history, see *supra* notes 56 & 57. Though the argument that section 110(g) indicates the intent of the enacting Congress is a strong one, oddly enough only two courts to date have considered this argument. See *United States v. Alcan Foil Products*, 889 F.2d 1513, 1518 (6th Cir. 1989); *United States v. General Motors Corp.*, 876 F.2d 1060, 1069 n.6 (1st Cir. 1989).

91. For a discussion of the analyses of the Fifth and District of Columbia Circuits, see *supra* notes 58-71 and accompanying text.

92. 876 F.2d at 1067. The court, spoke of a "hierarchy of priorities" and found the goal of improving the nations air quality as taking precedence over the states' interest in protecting its businesses. *Id.*

93. *Id.* at 1069 n.6. For the text of section 110(g) of the CAA, see *supra* note 56. The court noted that section 110(g) showed that Congress did not envision the statute as imposing a mandatory bar on penalties in the event that the EPA did not make a timely review of the SIP revision. *Id.* The court also noted that this section, giving a Governor the power to suspend enforcement of an existing SIP, would be superfluous if the existing SIP were already unenforceable due to the Agency's failure to review within four months. *Id.*

94. *Id.* at 1068-69.

95. *Id.* at 1067.

court suggested a twofold remedy for instances where the EPA fails to promptly review SIP revisions. First, the court stated that after the four month review period a party could attempt to compel agency action pursuant to section 304(a)(2).⁹⁶ Second, when the EPA brings an enforcement action pursuant to section 113, the district court has the responsibility for assessing the penalty.⁹⁷ In its evaluation, the court may consider the length and reason for EPA delay.⁹⁸ According to the First Circuit in *General Motors Corp.*, these two remedies would both create an incentive for the EPA to act promptly and would not subordinate the public's interest in cleaner air to the states' interest in tailoring their SIPs as would a bar on penalties.⁹⁹

It is submitted that, had the First Circuit been correct in holding that the CAA imposed a four month review period, the court's resolution of this second issue was fair, sound, and consistent with statutory construction. First, the court clearly had the power to remand the case to the district court to consider the equities of the case and assess penalties.¹⁰⁰ Specifically, the CAA empowers the district courts to consider "(in addition to other factors) the size of the business, the economic penalty on the business, and the seriousness of the violation."¹⁰¹ Thus, the First Circuit's holding was consistent with Congress' intent to give the courts discretion in assessing penalties. Second, the court's holding, as it noted, avoided rendering section 110(g) superfluous, as that section does not preclude enforcement under circumstances where the EPA fails to act promptly on a SIP revision.¹⁰²

It is further submitted that each of the circuit courts has viewed the explicit omission of a statutory deadline for review of SIP revisions and its consequences as a balance of power problem under the CAA between the federal government and the states. The rules developed by each of the circuit courts can be seen as representing a spectrum of views, each according power to the

96. *Id.* at 1067-68. For the text of section 304(a), see *supra* note 62.

97. CAA § 113(b), 42 U.S.C. § 7413.

98. *General Motors Corp.*, 876 F.2d at 1068.

99. *Id.*

100. See CAA § 113(b), 42 U.S.C. § 7413.

101. *General Motors Corp.*, 876 F.2d at 1068. The court in *General Motors Corp.* noted that the "other factors" language of section 113(b) included the court's consideration of the reasons for the EPA's delay and the prejudice to the business that may have occurred as a result of such a delay. *Id.*

102. *Id.* at 1069 n.6. As was noted *supra* note 57, section 110(g) was part of the 1977 Amendments. As a result, this section is merely a persuasive indication of a prior Congress' intent.

federal and state governments in different degrees. For example, the *Duquesne Light* rule affords the federal government the highest degree of deference by allowing penalties to be collected retroactively.¹⁰³ On the other end of the spectrum, the bar on collection of penalties opined by the *American Cyanamid* court tips the balance in favor of the states' right to tailor their SIPs.¹⁰⁴ The holding in *General Motors Corp.* falls between these decisions and permits the district courts to approach the issue on a case-by-case basis, weighing the equities of each case and inquiring into the reasons for EPA delay.¹⁰⁵

Absent specific statutory requirements and guidance, the courts have been left with the task of creating judicial rules based on conflicting interests. The policy arguments in support of each circuit court ruling represent the protection of either federal or state interests. Empirically, it seems certain that the EPA needs incentives in order to review SIP revisions promptly.¹⁰⁶ Nevertheless, it is the public that suffers when the EPA's power to penalize is emasculated.

V. THE SUPREME COURT'S DECISION

In *General Motors Corp.*, Justice Blackmun in a unanimous opinion presented a detailed analysis of whether or not the CAA imposed a four month EPA review period for SIP revisions. First, the Court rejected the argument that the language of either section 110(a)(2) or section 110(a)(3) imposed such a deadline.¹⁰⁷ The Court contended that the language of section 110(a)(3) that "it meets the requirements of paragraph (2)" meant that the revision must meet the substantive requirements of section 110(a)(2), not that the Administrator meet the deadline of that section.¹⁰⁸ Furthermore, the requirement in section 110(a)(3) of notice and hearing would be redundant if Congress intended to incorporate the procedural requirements of section 110(a)(2).¹⁰⁹ Second, the Court noted that Congress in other portions of the CAA explicitly

103. See *supra* notes 58-64 and accompanying text.

104. See *supra* notes 65-71 and accompanying text.

105. See *supra* notes 91-99 and accompanying text.

106. In *General Motors Corp.* it took the EPA over two and a half years to issue a decision on the SIP revision submitted by Massachusetts. 876 F.2d at 1064.

107. *General Motors Corp.*, 110 S. Ct. at 2531-32.

108. *Id.* at 2532. For the text of section 110(a)(2), see *supra* note 28. For the text of section 110(a)(3), see *supra* note 32.

109. *Id.*

imposed deadlines on the Administrator and, therefore, the omission of a deadline should be regarded as intentional and should not be inferred.¹¹⁰ Finally, the Court rejected GMC's contention that section 110(g) required the Administrator to act on revisions within four months.¹¹¹ The Court stated that while 110(g) presupposes a four month review period for revisions, that "mistaken" presupposition is insufficient to create a general requirement for all revisions.¹¹² On the basis of the above three points, the Court held that it would not read into the statute a four month review period.

Turning to the issue of penalties, the Court acknowledged that although the four month deadline was not applicable, the EPA was subject to the APA's requirements of acting on matters within a "reasonable time."¹¹³ The Court stated that a section 113 action may be brought by the EPA for violation of the "applicable implementation plan," a phrase statutorily defined as requiring approval by the Administrator.¹¹⁴ In addition, the Court noted that Congress had incorporated into the CAA a number of express bars on enforcement.¹¹⁵

VI. CONCLUSION

As the circuit courts developed conflicting rules concerning the review of SIP revisions, the EPA, states and affected businesses were uncertain about the consequences of the EPA's failure to review revisions within four months. Undoubtedly, this uncertainty hindered the ability of some businesses to plan their future operations. Perhaps more importantly, the bar placed on enforcement by some courts curtailed enforcement.

Although the Supreme Court in *General Motors Corp.* unified some issues of statutory construction of the CAA, perhaps the Court is not the best forum to answer the questions that have

110. *Id.* The Court cited examples in the CAA of instances where Congress had explicitly included time restraints, including sections 110(a)(3)(b), 110(c)(1), and 113(d)(2).

111. *General Motors Corp.*, 110 S. Ct. at 2532.

112. *Id.* The Court construed section 110(g) as not *requiring* the Administrator to take any action, but rather *authorizing* a governor to suspend an existing SIP under certain circumstances. *Id.*

113. *Id.* For a brief discussion of the APA's requirements *vis a vis* the EPA, see *supra* notes 40 & 41 and accompanying text.

114. *Id.* at 2533-34. Applicable implementation plans are defined in section 110(d) of the CAA. 42 U.S.C. § 7410(d).

115. *Id.* at 2534. The Court noted that section 110(d)(10) required such a bar on enforcement. *General Motors Corp.*, 110 S. Ct. at 2534.

been presented in this note. Congress could, by amending the CAA to fix a reasonable period for EPA review of SIP revisions, ensure an incentive for the EPA to timely review revisions, protect the reliance interest of the states and their industries, and strike a balance between the EPA's power to enforce the CAA and the right of states to tailor their SIPs.¹¹⁶ Moreover, Congress has better resources and more time in which to analyze the needs of the EPA in reviewing SIP revisions than do the courts. While the "middle course" of the First Circuit and the Supreme Court's decision provide flexibility for the courts in assessing penalties, it still requires the courts to make a determination of "how much time is enough time."

If the CAA is amended to specify the time in which the EPA must act on SIP revisions, the decisions of the First Circuit and the Supreme Court in *General Motors Corp.* will assume largely historical significance as an impetus to Congressional action. If Congress should choose not to amend the CAA to fix a deadline for EPA review, the Supreme Court's holding will bridge the divisions which existed in the courts of appeals.

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116. Currently, both houses of Congress are considering bills which would amend the CAA and include provisions which would require the EPA to act on the submission of SIP revisions within twelve months. See S. 1630, 101st Cong., 2d Sess. (1990); H.R. 3030, 101st Cong., 2d Sess. (1990).